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THE BASIS OF AFFIRMATIVE OBLIGATIONS IN THE LAW OF TORT.

(Continued from page 239.)

II. LESSORS AND VENDORS OF REAL AND PERSONAL PROPERTY.

In the preceding part of this article¹ it has been seen that while the obligation to refrain from injurious action is general upon all men, however placed, and extends to all within the radius of the effects of their acts, the obligation to take affirmative precautions to secure the safety of others is by no means so extensive.² Such duties are only imposed upon

¹ 53 AMERICAN LAW REGISTER, 209.

² It is submitted that all affirmative duties rest upon consideration: some benefit to him on whom they are imposed. A master is only liable for the acts of his servant not directly commanded by him when and because he is engaged in the furtherance of the master's business, see *supra*, pages 238-240, and in all cases in which one who employs an independent contractor is liable for his careless work, it will be found that it is where an affirmative duty, which can only be discharged by full performance, has been entrusted to the contractor and by his default has been imperfectly performed. Every one of these affirmative duties rests upon some consideration moving to the obligor; such as, among others, the exercise of some franchise, the use of one's property for some directly gainful purpose, *Francis v. Cockrell*, 5 Q. B. 501; or the exercise of some *quasi* public calling, such as

those who have voluntarily assumed a position or relation from which a benefit is derived by them. It has been seen that the duty to maintain either structures or chattels in safe condition rests upon him who uses, or causes them to be used, for his purposes. And in the case of chattels, at least, that such duty does not depend upon possession of the chattel, control over it,³ or present or even past ownership of it,⁴ save in this, that where the chattel was in good condition when it passed from the possession and control of him who supplied it, he, having done all that he could, was not bound to answer for any subsequent deterioration. However, while in the cases so far discussed, the chattel is out of the defendant's possession, it is being used directly in the defendant's business. There is another and more usual and important class of cases where the only interest in the use is indirect, where the article is leased to another that he may use it for his purposes. Now, most property, real as well as personal, may be put to many uses. A defect may exist which renders it dangerous if put to certain uses, but which does not in the least unfit it for others. Even the most ruinous of premises may be used safely, if only by pulling them down; the most worn-out machine may be safely used as scrap-iron. As has been seen, an owner of property in full possession and control thereof is not bound to put it in such perfect condition that it can be safely used for any purpose by anyone. He need only have it fit for the use to which he may choose to put it. If, then, the premises or article rented or sold be capable of any safe use, it is the lessee or vendee who is in fault if he puts it to a use for which its condition makes it dangerous. "A landlord who lets a house in a dangerous state is not liable to the

that of carrier of passengers. Of course, when the injury is caused by the very act which the contractor has been employed to do, *Penny v. Winebledon*, L. R. (1898) 1 Q. B. D. 212, or some necessary part thereof, *Pickard v. Smith*, 10 C. B. N. S. 470, a different principle applies. The employer is liable because he has personally caused the injurious thing to be done.

³*Heaven v. Pender*, *supra*, page 229; *Mulholland v. R. R.*, *supra*, page 232.

⁴*Elliott v. Hale*, *supra*, page 231.

tenants, customers, or guests⁵ for accidents happening during the term. "Fraud apart, there is no law against letting a tumble-down house."⁶

Now, the foundation of this immunity may be either some rule of public policy which aims to expedite and encourage the transfer of property by freeing the transferrer from all subsequent liability by the substitution of the new tenant or owner in his stead, as is indicated by many of the opinions,⁷ or it may result from this, that the lessee or vendee with knowledge of the defect (and the doctrine of *caveat emptor* requires him to know it if it be patent to inspection) need not be expected to use the premises in a way for which it is then to his knowledge dangerous.⁸ Such a result is not probable, so no danger is threatened to anyone, no wrong committed. No principle of public policy would, of course, protect the vendor who has been guilty of fraud; nor, if a defect was fraudulently concealed by the lessor or vendor, would there be any reason to anticipate that the lessee or vendee should refrain from any particular use of the premises or chattel. In fact, the very object of the concealment would naturally be to hold it out as fit for all purposes, and so increase its value and effect a sale or lease.

A stranger, one whose proximity to the property⁹ is in the exercise of some right of his own, and not by the permission of and in the right of the lessee, may recover against

⁵ He would, however, be liable to a passer-by on an abutting highway if he were injured by a fall of bricks, etc., from the ruinous structure. *Rich v. Basterfield*, 4 C. B. 782.

⁶ Erle, C. J. *Robbins v. Jones*, 15 C. B. N. S. 221. Willes, J., in fact prepared the opinion.

⁷ See *Curtin v. Somerset*, 140 Pa. 70; *Huset v. Co.*, 120 Fed. 865.

⁸ This conception of the legal improbability of wrongful action by others, though in fact perfectly expectable according to the known habits of mankind, was originally prevalent throughout the whole law of torts, but has been repudiated in all cases save those dealing with the obligations of owners of real estate, where archaic conceptions are preserved by the conservative attitude of the courts thereto. Such conceptions are often, by the analogies of real property law, applied also to cases dealing with the obligation of the owners or even makers of personal property. See *infra*, where this is discussed at greater length.

⁹ This can usually occur only in cases of real estate. Though see *Lossee v. Buchanan*, 51 N. Y. 479, where suit, however, was brought against the purchaser of a defective boiler.

the lessor who leases the premises in a ruinous condition for injuries received thereby; one coming on the premises in the right of a lessee may not. Why is this? If the immunity be the result of public policy, then there should be no difference between the two. If, on the contrary, it is owing to the fact that the defect being known to the lessee, there is no reason to expect that he will use the premises in a way for which it is unfit, the distinction is obviously sound. For, while such a building must until repaired remain a danger to those the exercise of whose rights¹⁰ force them to come within the reach of it, there is no reason to expect that the lessee will invite either customer or guests to come on the premises without warning until he has put them in a condition fit for their reception. The right of one coming upon the premises, even on the occupier's business, or using the chattels of another for his purposes, is not to have the premises or chattels made safe, it is either to have them made safe or, in the alternative, to have notice given him that they are unsafe.

When, however, the premises are rented for the purpose of being *at once* thrown open to the public for its use for a purpose for which its condition unfits it, the lessor has been held liable to anyone of the public injured. In *Barrett v. Lake Ontario Beach Co.*¹¹ a diving-chute had been erected by the defendant and leased to a company, who operated it. The defendant was the owner of an amusement park of which the diving-chute formed one of the attractions. The railings around the platform were not sufficiently close together, and the plaintiff, who had paid for admission to the chute, slipped on the wet platform, fell through the railing, and was injured. It was held that he could recover against the lessor. "If," said Gray, J., "the premises be rented for public use for which the lessor knows they are unfit and dangerous, he is guilty of negligence." When the defect is patent, the court conceded that the tenant may also be liable. There, however, was no fraud or concealment. "The

¹⁰ Persons using abutting highways and adjacent property owners.

¹¹ 174 N. Y. 310, following *Swords v. Edgar*, 59 N. Y. 28.

liability for the unfit condition of the premises which had been let for a specific purpose rests upon the omission to use due care in their erection and construction." "The essential principle is the omission or neglect in preparing a structure to be put to a particular public use to make it reasonably fit and safe for that use." "Such instances (of liability) are where one lets a warehouse so imperfectly constructed that the floors will not support the weight necessarily put on them." ¹²

*Fox v. Buffalo Co.*¹³ goes even further, for there the lessor of a race-track and a grand stand appurtenant thereto was held liable to a person injured by the fall of a defectively constructed stand, though the plaintiff had not purchased the ticket by which he obtained admission. "In ordinary cases," said Ward, J., "there is no implied warranty (no duty) that buildings leased for ordinary purposes are safe for such purposes. The rule is different in regard to buildings and structures in which public entertainments are designed to be given, and for admission to which the lessors *directly or indirectly receive compensation*. There the lessors hold out the structures as fit for use for such purpose, and undertake that due care (and that the highest) has been exercised in their erection. The defect was one of original construction. The defendant itself created an unsafe and dangerous structure; it was its duty to know that the structure was safe, or at least to exercise the highest degree of care to that end." ¹⁴

¹² See *Carson v. Godley*, 26 Pa. 111, and *Godley v. Haggerty*, 20 Pa. 387, two cases arising out of the same accident. The defendant was himself personally in default; he had chosen to be his own architect and his plans were defective. The building was built for the express purpose of being leased by the United States Customs for heavy storage under arrangement with the government, who were to take it over as soon as completed. Then there was both misfeasance and interest in the particular use to which the building was to be immediately put, and the case was clearer than *Fox v. Buffalo Co.* In the one case an owner of goods stored in the building, in the other a man working therein, was allowed to recover for injuries sustained by its fall. The cases, while often criticised by the Pennsylvania courts, have never been overruled.

¹³ 21 App. Div. (N. Y.) 321.

¹⁴ This means a duty such as a railroad owes to its passengers in regard to its roadbed and rolling-stock—a duty to answer for it that

The distinction seems to be between the lease of a building and the lease of a specific use thereof. In the first case the lessor has no interest or profit out of the particular use, in the latter he has. "The defendant participated in the profits of the undertaking with the lessee; on the single day on which it was rented, it had received two hundred dollars rental. It was thus a party to the wrong of holding out an invitation to come upon this dangerous structure"—i.e., for the purpose of the lessor's business, as well as that of the lessee. The rental value of the property depended upon its immediate fitness for this use. The rent was paid, not for so much land, but for a race-track with the appurtenances necessary for its immediate use as such; the defendant's business might properly be said to be the renting of racing facilities.¹⁵ The test would seem to be whether the lessor is interested in the particular use in which the injury is sustained, whether the property is to be put to such use immediately in its existing condition,^{15a} and whether the condition of the property and the use for which it is leased are such that injury is threatened to the public, or any particular class therein, if it be not in safe condition. Such seems to be the conception of the public use of which the court speaks early in its decision. In *Barrett v. Ontario Beach Co.* it must be noted that as a defect had arisen from originally faulty construction, the owners were liable without notice,

care is taken in their construction, by whomsoever they delegate such construction; not to insure the safety of passengers, but to insure that care has been taken to provide for their safety. Here, as in *Francis v. Cockrell*, L. R. 5 Q. B. 501, the stand was built by a competent builder under the supervision and from the plans of a competent architect.

¹⁵ Such, too, was the position of the defendant in *Camp v. Wood*, 76 N. Y. 99, who made a business of leasing the use and control of his premises for the night for dances and other village entertainments, and of the defendant in *Green v. Winters*, 17 Misc. 59, *infra*, who did not lease a wagon to the club for its use generally, but who supplied a picnic wagon for the very purpose of taking the club on its usual excursion—he leased not the wagon, but its use for picnic purposes—it was its fitness for that which gave it its rental value. See also *Campbell v. Company*, 62 Me. 582; *Wendell v. Baxter*, 16 Gray (Mass.), 494.

^{15a} In *Barrett v. Co.* the lessee was expressly prohibited by the lease from making any alterations in the structure without the lessor's written consent.

but that "if the dangerous conditions arose from some cause, such as decay, intervening after construction, notice or means of knowledge might have been imported." There would be in the latter case, however, not a mere duty to disclose known defects, but a duty to take affirmative steps to inspect in order to ascertain if any defects existed. The duty is still an affirmative one. It is to take care that the premises shall be fit for the particular use in which the lessor has an interest, from which he receives a benefit, indirect, it is true, but still a benefit derived from the particular use. The case seems identical in principle to *Heaven v. Pender*. There, too, the chattel had passed out of the defendant's hands, it, too, was leased as part of the docking facilities let to the shipowners for immediate use for a purpose for which it was unfit, and so dangerous. That the dockowner retained possession of the docks as a whole could make no difference; the dockage of the particular dock had been let and all the appliances and tackle had passed into the possession and control of the shipowners. They were being used directly in the business of the ship-painter. The dock-owners' interest in the use was as indirect as that of the defendant in *Fox v. Buffalo Co.*; he was interested in their use, because, since his docks could not have been rented for repair purposes without them, he obtained an enhanced rental by furnishing the necessary appliances for repair.¹⁶ The court in *Heaven v. Pender* had no difficulty in holding that the defective staging and appliances were furnished by the dockowner for use in his business, a use in which he had an interest and from which he derived a benefit.

No legitimate distinction can be drawn between the lease of a chattel or structure for use on the premises of the lessor, whether the lessor retains possession generally of such premises, as in *Heaven v. Pender*, or not, as in *Fox v. Buffalo Co.*, and the lease of a chattel to be used elsewhere.

¹⁶ Just as in *Fox v. Buffalo Co.*, without the stand the track was unrentable for exhibition purposes. It will be remembered that, in the lower court, Case, J., likened the defendant in *Heaven v. Pender* to a landlord who had parted with possession, and also that in his opinion the evidence did not show any defect at the time of transfer.

Interest in, benefit from, a particular use, and not the locality of the use nor the possession or control of the chattel, determines the obligation. So, in *Winters v. Green*¹⁷ it was held that the lessor of a coach furnished for a particular use and defective for such use through his negligence was liable to a person injured in consequence of these defects. The defendant had leased the coach to a social club for use at its annual picnic. The plaintiff was the guest of a member of the club. The hire was probably paid out of the club's treasury, not by members who went on the picnic; certainly the plaintiff paid nothing. Daly, P. J., said: "The injury sustained was due to the breach of the defendant's duty to furnish a reasonably safe machine in good order for the purpose for which it was hired. For this breach of duty the defendant is liable to a guest of the club as well as to one of its members. . . . The defendant would not be liable to a stranger—*i.e.*, a person not connected with the club or a member not carrying out some right which the club had in using the coach pursuant to the contract. Recovery must be confined to the lessee or a person connected with him in carrying out some right which he had under the contract of hire." While the obligation is not confined to parties to the consideration or to the contract, it does not extend beyond those who, in view of the contract, may be expected to use the coach. The obligation does not arise out of the contract, but out of the relation assumed under it, and the contract may be shown not as creative of rights and obligations, but as giving notice to the defendant of the extent of the injury threatened by a breach of his duty.

It may be safely said that, 1st, one who furnishes an article or structure for use for a purpose in which he has an interest, direct or indirect, and from which he derives directly or indirectly a benefit, is bound to exercise care to have the structure or article fit for such use.¹⁸

¹⁷ 17 N. Y. Misc. 597; 40 N. Y. Supp. 659.

¹⁸ This is the generally accepted rule throughout the United States. See *Globe Co. v. Coughry*, 56 N. Y. 126; *Hayes v. R. R.*, 150 Mass. 457; *Bright v. Barrett*, 88 Wisc. 289. A rather extreme case is that of *Fish Kerlin Gray Electric Co.*, 99 N. W. 1092 (S. D.), 1904. The defendant had erected an arc light in a church, and originally had

2d. Such obligations can extend no further than the ability to satisfy them. Where the possession of the article or structure is transferred, if it be at the time of transfer fit for the use for which it is designed, the transferee is alone responsible for any defects arising subsequently, since with the possession and control passes the power to inspect and repair; he is alone able to observe and remedy such defects, and his alone is the duty of inspection and repair.

Upon this latter principle depends the much cited and generally misunderstood case of *Winterbottom v. Wright*.¹⁹ This case came before the court on demurrer. The declaration alleged that the defendant had contracted to supply to the Postmaster-General and keep in repair a mail coach, and that *by virtue of the said contract* it was the duty of the defendant to keep the coach in repair; that the plaintiff, knowing and relying on the said contract, had engaged to drive the coach, and that by reason of the defendant's disregard of his contract and failure to perform his duty thereunder the coach became in a weak condition, and broke down and injured the plaintiff.

In form, the only obligation alleged was clearly one arising solely by virtue of the contract to which the plaintiff was not a party, but upon which he, knowing of its existence,

retained the ownership of it, but had transferred it before the accident. They, however, agreed to furnish the electricity and to keep the light and machinery connected with it in good order. The light had worked badly, the defendant sent a man to repair it; the repairs were badly done and the lamp fell on the plaintiff, a member of the church. It was held that the defendant's obligation was not terminated by the transfer of the lamp, since they still continued to use it for the transmission of their current, and so in the course of their business; and also because they had contracted to keep the lamp in repair. The case might also have been decided as it was on the ground that whatever their duty to repair might be, they were liable because they had attempted to repair and repaired badly, misfeasance whether the undertaking was gratuitous or not. See *infra*, page 285. But see *Thomas v. Mayville Gas Co.*, 56 S. W. (Ky.) 153; 53 L. R. A. 147, where an electric-light corporation which used trolley-wires for the transmission of its current was "chargeable with the duty to see that the wires were properly insulated, and it as well as the Trolley Company is liable for a failure to perform that duty if a person is killed thereby."

¹⁹ 10 M. and W. 109 (1842), generally cited as authority for the totally different rule that the maker of an article is freed by its sale from all liability, save to the vendee, for defects of original construction.

had chosen to rely.²⁰ In substance, the breach was a failure to keep the coach *in repair*. There is no allegation in the declaration that the coach when delivered to the Postmaster was in any way defective. In this it differs from the cases of *Heaven v. Pender*, *Elliott v. Hall*, and *Winters v. Green*. With the transfer of possession, the legal duty of repair had passed to the Postmaster and rested solely upon him. Any obligation to repair assumed by the lessor in his contract must rest solely upon the contract, and not upon his position as lessor of a coach for use as such. It would be a mere arrangement between the Postmaster and himself by which he assumed the burden of performance, but by which the legal obligation and liability of the respective parties towards others remained unchanged. Like similar agreements by landlords in leases of real estate,²¹ and like statutes imposing upon abutting owners the cost of repairing sidewalks,²² it is the burden of performance, and not the obligation, which is transferred. The party liable may make what arrangements he pleases for the performance of his duties; he still remains liable, and solely liable, for their non-performance. The duty cannot be transferred. The lessor becomes, as it were, an independent contractor for the performance of the lessee's duty of repair. As Lord Abinger said: "Here the action is brought simply because the defendant was a contractor with another." And Rolfe, B., said: "The breach of the defendant's duty stated in the declaration is an omission to keep the carriage in a safe condition, and when we examine the mode in which it is alleged to have arisen, we find the statement that the defendant assumed it under and by virtue of the contract. The duty is shown to have arisen solely from the contract, and the fallacy consists in the use of the word duty. If

²⁰ It must be remembered that at the time and in the court before which the case came for decision the utmost accuracy of pleading was still of essential importance.

²¹ *Tuttle v. Gilbert*, 145 Mass. 169; *Stock v. Boston*, 140 Mass. 416; *Hahn v. Roach*, 7 Northampton Co. Rep. (Pa.) 22.

²² *Rochester v. Campbell*, 123 N. Y. 405. The Pennsylvania rule by a singular misconception of their own cases is *contra*. *Mintzer v. Hogg*, 192 Pa. 137.

a duty to the Postmaster, that is true; if to the plaintiff, there is none." In form the duty was alleged to arise not as a legal incident to the relation between the parties, but solely by virtue of the contract; in substance, no duty existed to repair save under the contract, for a lessor owes no duty of repair after the property is transferred.²³

What Lord Abinger says in his opinion must be read with a clear conception of the point actually before the court. He fully recognizes that where by contract a relation is created to which the law attaches the obligation of care, such obligation is not contractual in origin, and extends beyond the parties to the contract. He, no doubt, takes too narrow a view of the relations to which such duty is attached, but his attention is not specifically directed to this point.²⁴ He also recognizes that for active misfeasance threatening and causing injury to the public, the liability is not restricted to the parties to the contract in the execution of which it is committed.²⁵ He is concerning himself with duties such as that in the case in hand. It may well be that what he says of the injustice, "that after the defendant had done everything to the satisfaction of his employer in all matters between them adjusted and the accounts settled, on the footing of the contract, we should subject them to be ripped open by this action of tort," may be quite true, where the duty is purely contractual; one which can affect no one but the promisee, or even as here, where the burden of performing a duty owed by the promisee to others is

²³ Omit the contract to repair after transfer, and the case becomes that supposed by Cave, J., to exist in *Heaven v. Pender*, L. R. 9 Q. B. D. 306, that the defect in the staging in that case had arisen after transfer and that the lessees and not the defendant were, therefore, liable for its condition, due, not to an original defect, but to lack of repair.

²⁴ He says unless some public duty be undertaken or a public nuisance created, no action of tort can be brought unless an action on the contract would lie. There is no instance, he states, in which a "party not privy to a contract with a carrier can maintain an action." Only nine years after this began in *Marshall v. York and Newcastle*, 11 C. B. 665, that line of decision which has firmly established the right of anyone accepted as a passenger to recover in tort, though not privy to the contract for his carriage.

²⁵ See note 24, "or public nuisance created."

taken over by the contract.²⁶ What is an adequate performance of the contractual obligation concerns only the parties, but where the contractor or lessor, by reason of his position as such, owes a duty to others than his employer or lessee, while the employer may be satisfied, the public is not, so long as danger is threatened to it; while the accounts between the parties to the contract are settled, the contractor's whole liabilities are not discharged until he has paid for all the injury he has done. As Baron Parke says in *Longmeid v. Holliday*,²⁷ "One who creates a public nuisance cannot be saved from the consequences of his wrongful act by showing that he was also guilty of a breach of contract and responsible for it;" or that he has paid damages for it, or been excused therefrom. To deny recovery to the injured because of the inconvenience caused to the guilty by the disturbance of their accounts would be the height of injustice.

Then, too, when Alderson, B., says, "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty," it must again be remembered that he was speaking of the right to recover for the breach of an obligation arising both in form and substance solely by virtue of the contract. His statement is no authority for the position that an obligation imposed by law upon the conduct of a business or a relation voluntarily assumed should, because by a contract a similar duty has been expressly assumed towards some of them, be confined to these latter only, among all of those for whose protection the duty was imposed. While it is true that no one's rights can be enlarged by a contract to which he is no party, it is equally true that they cannot be restricted or destroyed thereby.

²⁶ Such others have been in no way prejudiced by such delegation of the performance, their remedy against him who originally owed the duty is as available and complete as though he had attempted the performance of his duty in person or by his servants. In this case, it is true, there was a duty of imperfect obligation, unenforceable because of the public position of the Postmaster, but this was a risk known to and assumed by all who dealt with him.

²⁷ 6 Exc. 761.

While the affirmative duty of seeing that an article is in safe condition for a particular use rests on him who has an interest in the particular use, direct or indirect, and while a lessee in possession of such article, being the only person able to observe the need of repairs, is alone obliged to maintain it in fit condition for use, the lessor, whether bound by contract with his lessee to repair or not, may make himself liable if he does make repairs and make them badly.²⁸ He is not bound to act, but he is bound, if he acts, not to act carelessly. While under no duty to repair, and so not liable for non-feasance, he is liable for active misfeasance. Nor can he claim that he could not expect his tenant to use the article while out of repair, for by his assuming and making the repairs, he has led his tenant to believe that the article had been rendered fit for use.²⁹

Such, then, appears to be the effect of the cases dealing with the obligation of lessors of real and personal property. It remains to consider the effect of a transfer, not merely of the possession, but of all title to the land or chattel, of all interest in its future use, as where it is sold or where a contractor hands over a finished article or structure to his employer.

Many influences have tended to confuse and to cloud this question. It is possible to look at the matter from many sides. It deals with the rights and obligations of property subject, as they are, to highly technical and artificial rules

²⁸ *Gregor v. Cady*, 82 Me. 131; *Gill v. Middleton*, 105 Mass. 477.

²⁹ Unless he actually makes repairs and does so badly, the tenant cannot in an action on a covenant to repair recover for an injury to himself or family from the ruinous condition of the thing leased. *Shick v. Fleishner*, 26 Ap. Div. (N. Y.) 210. Under the rule of *Hadley v. Baxendale*, 9 Exch. 341, such injury is not the normal result of such breach, which is only that the tenant will use the thing leased until repairs are made, or will be forced to have them made at his own cost. Nor are there usually any circumstances known to both at the time the covenant to repair is made which brings within the defendant's view the probability that the tenant will wrongfully continue to use the structure unrepaired. The lessor, being out of possession, can only know of the need of internal repair through notice from the tenant. Before the lessor need make repairs, therefore, the tenant must know the condition of the thing, and if its condition render its use dangerous, the lessor need not expect him to continue to use it; if danger is not probable, the injury sustained is not expectable.

in which archaic conceptions persist by reason of the conservative attitude of the courts to questions of this sort.³⁰ In addition, considerations of public policy lead the courts to look with disfavor on any obligations which tended to restrain the free alienation of property.³¹

The cases dealing with the effect of a sale of real property are few in number. In the cases of *Blunt v. Aiken*³² and *Harper v. Plumer*³³ directly opposite decisions were rendered upon practically the same state of facts. In each the defendant had erected a dam upon his land to a height which caused an overflow upon the land of the plaintiff. In both the defendants had aliened the land; in both the same English cases were cited. In *Blunt v. Aiken* it was held that by the sale the defendant had relieved himself from all liability for any injury which occurred after the transfer. In *Harper v. Plumer* it was held that the defendant, having created the nuisance, remained liable for its injurious effects until it was removed. *Blunt v. Aiken* was qualified in *Waggoner v. Jermaine*³⁴ by holding that where the vendor had sold with a warranty he remains liable, and in *Conhocton Stone Road v. The Railroad*,³⁵ Lott, C. C., treats *Waggoner v. Jermaine* as having entirely overruled *Blunt v. Aiken*, and as holding that "an original wrongdoer, notwithstanding alienation, remains liable for the damages occasioned by the continuance of the nuisance subsequent to the conveyance," and such, he says, "is a part of the rule in *Penruddock's Case*,"³⁶ itself one of the cases relied upon in *Blunt v. Aiken*. This latter case, therefore,

³⁰ In which, too, the courts have, perhaps, been unconsciously influenced by the fact that they themselves sprang from the landholding cases, and so were inclined to free landowners of onerous liability at the earliest possible moment.

³¹ It can be readily seen that if the obligations of property owners were continued after the benefits of ownership were gone, a would-be vendor would think twice before parting with the property for whose condition he still remained liable. "Public policy does not demand that such clogs on alienation should be imposed by construction." Dean, J., 182 Pa. 89.

³² 15 Wendell, 522.

³³ 3 N. H. 69.

³⁴ 3 Denio, 306.

³⁵ 51 N. Y. 573, at page 593.

³⁶ 9 Rep. 50 a.

can scarcely be said to be authority to-day even in the court which decided it, and there seems little doubt that the decision in *Harper v. Plumer* correctly represents the effect of the early English cases cited in it.

It was decided in *Palmore v. Morris Tasker Co.*³⁷ that all liability for non-repair of a ruinous gate passed to the vendee together with the title and possession of the premises in which it was situated, even though the injury occurred so soon after the transfer that the vendee had no opportunity to repair.

"This is not a letting of the land to a tenant,"³⁸ said Dean, J., "it is an absolute sale whereby the owner divests himself of title and all right to re-entry for repairs or for any other purpose; and with his surrender of possession all the duties incident to ownership were at an end" and were transferred to the vendee. Now, while *Blunt v. Aiken* was cited with approval, the case may be supported irrespective of the point involved therein, nor is it necessarily in conflict with *Plumer v. Harper*. It is the obligations incident to ownership which are transferred with it, just as feudal duties and services were transferred by the alienation, with the lord's consent, of the fee out of which they arose, the duty to repair being one of these duties passed to the vendee, "and he became answerable to the public for neglect in its performance." In *Plumer v. Harper* it was the liability of the creator of an injurious condition to answer for all the natural consequences of his *act*, which was held to continue after title had passed from him.

The latter had no real connection with the ownership of the land. The act, while committed upon the land, could as well have been committed by a trespasser, a licensee or tenant, as by the owner. The liability depends upon an act wrongful by whomsoever done, and does not depend on ownership or possession, and there seems, therefore, no reason why, simply because the wrongdoer happens to be the

³⁷ 182 Pa. 82.

³⁸ *Cheetham v. Hampson*, 4 T. R. 318, cited in the opinion, was a case of landlord's liability to repair fences after lease.

owner, his liability should be terminated by the alienation of the scene of his wrong. Where, on the contrary, the injury results not from an active misfeasance in itself wrongful, but from a failure to perform an affirmative duty arising out of the ownership and possession of property, the obligation would be transferred by alienation together with all attendant liability. So where the vendor has merely allowed a nuisance created by his predecessor in title to remain upon the land, and has transferred it to his vendee, his liability for its continuance, arising, as it does, from his ownership and enjoyment of the land with its appurtenant nuisance, would undoubtedly cease with alienation.³⁹

All the cases which hold a vendor of real estate liable for the creation of a condition thereon which is a source of probable future injury have dealt with conditions the effects of which extend beyond the land.⁴⁰

It has been seen—1st, that all obligations incident to

³⁹ Whether in *Palmore v. Morris Tasker Co.* the ruinous condition of the gate might not have been properly held to be a defect created by the misconduct of the vendor, by the non-performance of an obligation which undoubtedly rested upon him until the moment of transfer of possession rather than as the result of a breach of the obligation to repair, which, having passed out of him by the sale, was in the vendee when the gate fell, is perhaps open to doubt. That the condition was patent and that the vendee took possession with knowledge or means of knowledge that a danger existed which if not immediately repaired, or even before repairs could be made, might cause injury and liability, induced the court to hold that he had accepted the land with all the obligations and liabilities attendant upon its existing condition.

⁴⁰ How far the rule contained in *Fox v. Buffalo Co.* would be extended to a case where a defect has been created unsuited structures upon real estate for a purpose for immediate use for which they are sold has not been determined. It may be at least said that in such case the defect must be latent. Whether it is necessary that it is known to and concealed by the vendor is more doubtful. On principle, this should not be necessary. The reason why either the lease or sale of structures internally defective in the absence of fraud is not wrongful, is because, as a rule, there is no reason to anticipate that the land or structure, if capable of many uses, will be used for a purpose for which it is unfit, or if peculiarly adapted for any particular use will be put to it until inspected and rendered safe for such use. Where, however, a structure is sold for an immediate use for which on its face it appears fit, such immediate use is to be anticipated, and where the vendor has himself created the structure and has received an enhanced price because of its availability for the special purpose, it would seem that he should, under *Fox v. Buffalo* and *Barrett v. Ontario Beach Co.*, remain liable even after alienation.

ownership are transferred with it; 2d, but that liability for the wrongful creation of a nuisance upon the land is not terminated by alienation; 3d, in addition it is intimated in *Robbins v. Jones* that a lessor may be liable even for internal defects if fraud on his part at the time of the lease be shown, and in *Palmore v. Morris Tasker Co.*, Dean, J., says: "If a grantor conceals from the grantee a defect in a structure known to him alone and not discoverable by careful inspection, he may be held liable though out of possession," and there appears to be no reason why his liability should not extend to the concealment of interior defects rendering the structure unsafe for a use for which it is manifestly designed.

Turning now to personal property: The only obligation arising out of possession of personal property is to keep it in safe custody if it be dangerous unless carefully guarded. Such obligation would undoubtedly pass by transfer of possession. The obligation to keep the property in safe condition is upon him who not merely is in possession, but who uses it, or upon him who, while not in actual possession, supplies it for use for his own purposes. Interest in and benefit from the use raises the duty to take care that it is fit for the particular purpose for which, while in his possession, he uses it, or to see that it is fit for use when he supplies it, and so parts with the possession and the ability to control its future condition.

Now, where the article is sold, the sale normally exhausts all the vendor's interest in its future use. While immediate availability for a particular use may constitute its principal value, may alone render it salable, such benefit as may accrue therefrom is realized by the sale—it is immaterial to the vendor whether the vendee uses it at all after he buys it.⁴¹ The benefit and interest are too remote to impose any obligation upon the vendor to take affirmative precautions to

⁴¹ If the vendor of a patented machine retained a royalty thereon proportionate to the use of it, it is submitted that there would be an interest sufficiently direct to raise an obligation to take care that the machine was when sold fit for use; though no case has been found raising this precise point.

ascertain that an article is fit for its normal use. Liability, if any, must be sought elsewhere.

It is quite obvious that from the contract of sale with its stipulations, whether warranties or conditions as to the character, quality, or condition of the thing sold, no duty can arise save towards persons parties to the contract, by or on behalf of whom the consideration is to be paid.⁴²

One not a party to a contract can recover for an act or omission, which is also a breach of contract, where, and only where, "there has," as Baron Parke said in *Longmeid v. Holliday*,⁴³ "been a wrong for which he would have had a right of action, though no such contract had been made."

The tendency of the courts to consider all obligations owed between parties to a contract as solely and directly consensual,⁴⁴ and so to import into the contract implied terms which are nothing but recognitions of the obligations already imposed by law upon their voluntary assumption of specific relations for the protection of those whose safety is dependent upon their careful conduct in the relations so assumed, has led to great confusion. In this way a great number of obligations have been bodily transported from the law of tort to that of contract, and obligations imposed by law for the protection of all who would be probably injured by their breach have been conceived as being merely creatures of the consent of the parties to the contract, as private grants of private rights extending no farther than the party to whom they were given.⁴⁵

⁴² Great confusion has been introduced into the subject by the idea that a recovery, if any, in such case must be based on the contract, and involve a decision as to the right of persons not party to the contract for whose benefit it is expressly or impliedly made to sue thereon.

⁴³ 6 Exch. 761.

⁴⁴ The modern and correct view is expressed by Henn Collins, M. R., in *Clarke v. Army and Navy Store*, L. R. (1903) 1 K. B., page 164: "I do not agree with the contention that the contract of sale sweeps into itself all collateral obligations of vendors arising out of that sale, . . . and that unless a duty to use care can be derived from these terms, expressed or implied, it does not exist. I do not think that the contract of sale, which is mainly concerned with the passing of the property, necessarily exhausts all the obligations of the parties."

⁴⁵ To this confusion was due the long prevalent idea that the carrier of passengers was liable only to a passenger who was a party to the contract of carriage. See Lord Abinger's dictum in *Winterbottom v.*

Modern tendency is to make the fundamental nature of the obligation the test as to whether the action is founded upon either tort or contract.⁴⁶ If the obligation is one imposed by law, either to act or to refrain from action, because the performance of such obligation is usually necessary in order to prevent probable injury to others, the obligation is fundamentally one of the law of torts. An obligation to do an act which will confer a benefit and whose breach will cause no other injury than the loss of such expected benefit is purely contractual. And since the law is highly general in its imposition of duties, if precautions not generally required by the relation of the parties are bargained for, though their omission will deprive the party of the expected protection and so may cause actual injury, the obligation being one not usually required to be imposed, is an additional safeguard, a benefit contractual in its essence.⁴⁷

The liability of the vendor of an injuriously defective chattel (apart from that for breach of some stipulation of the contract of sale, a liability wholly contractual) may arise, 1st, out of misconduct as vendor; or, 2d, out of misconduct in some prior position voluntarily assumed by him, through which misconduct the defect is created.

Where the vendor's sole connection with the article is as vendor, where even his possession of it is only for the purpose of selling it, he can only be liable for some active misconduct as vendor or for the breach of some duty imposed by law upon the relation of vendor to purchaser.

Wright, supra, note 24. The obligation was thought to arise from a stipulation to carry safely implied in the contract of carriage. This particular fallacy has been completely exploded. *Marshall v. R. R.*, 11 Com. B. 665; *Foulkes v. R. R.*, L. R. 5 C., P. D. 157; *Derby v. R. R.*, 14 How. 468. However, so late as 1866 Willes, J., in *Indamaur v. Dames*, was forced to state what appears to be sufficiently obvious: that the duty of a shopkeeper towards his customers arose not out of any implied contract, but from a use of the property for the owner's purposes."

⁴⁶ So in *Turner v. Stallibrass*, L. R. 1898, 1 Q. B. 56, it was held that where the plaintiff showed a bailment of a horse to the defendant upon which at common law was imposed a duty of careful custody, an action for the breach thereof was founded upon a tort, although the defendant had expressly agreed to keep the horse safely.

⁴⁷ If this be kept in mind, Baron Parke's statement becomes a valuable guide, instead of merely removing the difficulty one step further back.

When, however, he is not merely the vendor of the article, but has made or repaired it or in any other way so dealt with it that to his active misconduct, or lack of adequate care and skill, the defective condition of the chattel must be attributed, is he not also liable as the wrongful creator of the injurious defect? It is submitted that he is, and that his liability is established by the current of English decisions and by the analogies of the cases just considered which deal with the effect of the alienation of real property.

A vendor of real estate on which he has erected a nuisance does not terminate his liability by alienating the land on which it is situate. But if the defect created can affect only those coming upon the land, he is in the absence of fraud freed by sale from further liability. Is a latent defect in a chattel unfitting it for use for that purpose for which it is designed, and for which its appearance indicates that it is fit, analogous to a nuisance or to an interior defect in a structure purely internal in its effects?

Personal property differs from real estate in many particulars. Real estate is fixed in location. The condition of a structure thereon must be expected to affect the safety of persons (and their property) who are brought into inevitable contact with it in the exercise of their independent legal rights. Chattels, on the contrary, being movable, are with few, if any, exceptions, not in themselves dangerous whatever their condition or character. They may become so by being placed in some particular place, by negligent custody, or by being put to some particular use.

But while land is generally usable as land for many purposes and has a value apart from its immediate availability for particular use, many chattels, and as highly specialized appliances become more and more prevalent an increasing number of them, are designed for one use only and are valuable and salable only because immediately available for this particular purpose.

While there may, therefore, be no reason to anticipate that land or buildings thereon will be put at once to any particular use, but only that they will be used for such purposes as they may be found suitable for, and that it will be put

in safe condition for whatever use the owner may choose to put it, and so in the absence of fraud there may be no wrong in selling or leasing land or buildings with *interior* defects, there is no reason for similar anticipation in regard to an article whose only value lies in its availability for some one particular immediate use.

If, then, the distinction between liability for the creation of injurious conditions whose effects are internal and those whose effects are external to the land depends on the reasonable anticipation of injury arising from them, a condition of a chattel unfitting it for the use for which, on its face it appears to be designed, would appear to be equivalent to a condition of real estate injurious to neighboring owners and travellers on adjacent highways.

While there is no good reason for allowing a sale of a defective chattel to terminate the liability of him who created it while an alienation of a structure in itself a nuisance does not; in either case the nuisance or defect must have been wrongfully created either by active misconduct or by the breach of some positive obligation imposed as an incident to the assumption of some particular relation to the public or some class thereof of which the plaintiff injured is a member.

Where the vendor is also one engaged as his trade or business, in the manufacture of such articles, he has, it is submitted, assumed by engaging in it a duty to exercise it competently.⁴⁸ This obligation to exercise a calling competently is of great antiquity, long antedating the discovery that by the action of *assumpsit* executory parol contracts might be enforced. So early as 1537 Sir Anthony Fitzherbert in his abridgment, "*De Novel Natura Brevium*,"⁴⁹ laid it down as a principle of the common law that "it is the duty of every artificer to exercise his art rightly and

⁴⁸ The instances given by Parke, B., in *Longmeid v. Holliday* of the right of persons not parties to contracts to recover for what is also a breach thereof, are largely instances of the non-performance of obligations of this nature—apothecaries, surgeons, carriers, etc.

⁴⁹ *Writ de Trespass sur le Case*, page 94 D, which Lord Coke calls "An exact work exquisitely penned."

truly as he ought." So in Y. B. 3 Hen. VI, 36, pl. 33 (A.D. 1425), Martin, J., says: "If he (the millwright) has made a mill which is wholly spoiled and bad, a writ of trespass lies." And in Y. B. 20 Hen. VI, 34, pl. 4, Paston, J., says: "As in the case of a carpenter taking upon himself to make me a house of such a length and such a width and such a height, which he (does) but he makes an error in (joining) or some such way which is outside the covenant. Now action of covenant fails me, because he has kept all his covenants, and yet I shall have an action of trespass on the case, because he has done badly."⁵⁰ This obligation to exercise one's art sufficiently well to avoid causing injury long antedated the implication of warranties or conditions that the article should be properly made. In covenant there was no room for such implication of warranty, even had such been possible in a simple contract; if the thing granted was given, the covenant was satisfied. Anyone injured must look for a remedy to an action on the case. The duty to do work in a workmanlike way does not originate in a promise or warranty implied in fact. It is a duty imposed by law as the price of engaging in any business whose unskilful exercise will probably be injurious to the legal rights of others.

The instances of liability for the misperformance of a contract to anyone not privy thereto, given by Baron Parke, are instances of this obligation, and show that, like all duties imposed by law, it is not limited to the parties to the contract, but extends to all to whom actual injury is threatened by its non-performance.

In *Everard v. Hopkins*⁵¹ Lord Coke puts this case: "If

⁵⁰ This is an instance constantly given of an admitted action on the case for misfeasance apart from covenant, and constantly occurs in similar language, see also Y. B. 21 Hen. VI, 55, pl. 12, per Bingham, J. Another common instance is that of a farrier who in shoeing a horse pricks it and injures it. While it may be contended that a farrier was exercising a public trade and was bound to shoe every horse offered him, no such contention is possible in the case of a carpenter or millwright. Such trades were purely private, and could be exercised or not at pleasure.

⁵¹ 2 Bulst. 332 (1688), cited in the course of the argument of *Longmeid v. Holliday* by Parke, B.

a master sends his servant to pay money for him upon the penalty of a bond, and on his way a smith in shoeing doth hurt his horse, and so by reason of this the money is not paid, this being the servant's horse, he shall have an action on the case for pricking of his horse, and the master also shall have his action on the case for the special wrong which he had sustained by the non-payment of his money occasioned by this." Parke, B., makes the just comment that the cause of action is certainly remote. It is very doubtful whether to-day such a result would be considered a natural consequence of the pricking of the horse. It, however, shows that a person who engaged in the business of a farrier was, in the opinion of Lord Coke, liable for misfeasance in his business towards all who might be injured thereby. In *Pippin v. Shepard* ⁵² there is a still stronger recognition of the obligation of one practising a profession or business to practise it competently. In that case the declaration stated that the defendant was retained and employed for a reward to attend to the hurts which the plaintiff had received, and that he had unskilfully and improperly treated the wound whereby the plaintiff was injured. It was urged that there was no allegation that the plaintiff had retained the defendant or by whom the reward was to be paid. It was held that it was sufficient that the declaration should state that the surgeon was employed for a reasonable reward to attend the patient and that he entered upon the treatment. Richards, C. B., said: "The defendant being a surgeon undertakes to the public to cure wounds and other ailments. It is sufficiently stated that the defendant undertook the cure. Negligence and improper treatment are charged. The question is, to whom was injury done? From the necessity of the thing the only person who can sustain an action for damages for an injury done to the person of the patient is the patient himself, although the surgeon may not have been retained and employed by him to undertake the cure." And Garrow, B., said: "In all cases of surgeons retained by any of the public establishments, it would

⁵² 11 Price, 411 (1822), cited by Parke, B.

happen the patient would be without redress, for it could hardly be expected that the governors of an infirmary could bring an action against the surgeon employed by them to attend the child of poor parents who may have suffered from his negligence and inattention." Similarly, in *Gladwell v. Steggall*,⁵³ it was held that a plea to a declaration stating that a plaintiff, an infant, had employed defendant as surgeon to cure her, and that she had been injured by his misfeasance, which set forth that the plaintiff did not employ defendant, was bad, it being immaterial by whom the defendant was employed. "The substance of the issue," said Erskine, J., "presented by the declaration is that the defendant was employed to cure the plaintiff, not that he was employed by the plaintiff."

In *Dalyell v. Tyrer*⁵⁴ these cases were cited with approval, the facts being as follows: One Hetherington, owner of a ferry, hired for a day from the defendants a steam tug and crew to assist in carrying his passengers across. He received the fares, and paid the defendants for the use of the tug. It was held that the defendants were liable to the plaintiff, a passenger, for an injury sustained by the breaking of a part of the tackle. Earle, J., said: "If Hetherington pays the defendants for the use of the ship, and they do so carry him, the plaintiff, are they not retained for hire and reward to carry the plaintiff?" This was a case in which, therefore, the defendants were not acting gratuitously but for reward in the course of their business, as shipowners engaged in the carrying the plaintiff, and were therefore bound to him to exercise due care in his carriage.

In addition, in the case of *Marshall v. York and Newcastle R. R.*⁵⁵ the carrier's liability to one not privy to the contract of carriage was rested directly by Williams, J., on the duty of every artificer to exercise his art rightly as he ought, citing Fitzherbert.

In all of these cases the recovery was based upon the breach of an obligation existing at common law upon the

⁵³ 5 B. N. C. 733; E. C. L. R., vol. xxxvii, cited by Parke, B.

⁵⁴ E. B. and E. 898, 96 E. C. L. R.

⁵⁵ *Supra*, 11 C. B. 665.

various defendants to practise their trades or professions competently and carefully, and not upon any term in the contract of employment expressed or implied. The obligation, therefore, was not restricted to the parties to the contract of employment (for in each case there was a contract of employment to which the plaintiff was not a party), but extended to all to whom injury was threatened by carelessness therein. Two comparatively recent cases illustrate the application of this principle and its limitations. In *Parry v. Smith*⁵⁶ the defendant, a gasfitter, employed by the owners of a house to repair a gas-meter in the cellar, made a temporary connection and the plaintiff, a housekeeper, employed by the owner, having occasion to go into the cellar with a lighted candle, was injured by an explosion of gas which had escaped through the temporary connection. On the part of the defendant it was contended that to entitle him to recover, the plaintiff must show privity of contract with the defendant, a public nuisance created by the defendant, or fraud, misrepresentation, or concealment. It was held, however, that the plaintiff could recover, Lopes, J., saying: "The plaintiff's right is founded on a duty which attaches in every case where a person is using or dealing with a wholly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to bystanders. A breach of this duty is a misfeasance, independent of contract." This case, on its facts, is an instance of the obligation of one exercising a trade in the course of which, from its dangerous nature, injury would result unless properly exercised, to exercise it carefully.⁵⁷

The last case on its facts was one of a person exercising a calling in the course of which, from its dangerous nature, injury would result unless properly carried on. The case of *Collis v. Selden*⁵⁸ would seem to mark the limits of this

⁵⁶ L. R. 4 C. P. D. 325.

⁵⁷ Had the defendant not been a gasfitter exercising his calling, but a volunteer who had made the temporary fitting gratuitously, it is submitted that a different question would have been presented and a different result reached.

⁵⁸ L. R. 3 C. P. 494 (1868).

principle. In this case the declaration alleged that the defendant had carelessly hung a chandelier in a public house, knowing that the plaintiff and others were likely to be therein, and the plaintiff being lawfully therein was injured. On demurrer, it was held that the declaration was bad. It is to be noted that there is no allegation here of the character of the defendant; from all that appears, he may have been the owner of the property, a tenant, a gasfitter, or a mere volunteer. Neither is there any allegation as to the plaintiff save that he was lawfully upon the premises. Now, had the plaintiff been a bare licensee, the owner himself would have owed him no duty other than to warn him of any danger known to him, and there is no allegation that the defendant was aware of the defective condition of the chandelier. It does not appear that the defendant had as in the course of his business and for a reward hung the chandelier in question, "nor," as Willes, J., says, "is there any allegation that the chandelier was in its nature dangerous or likely to do damage or that it was so hung as to be dangerous to persons frequenting the house." If the case stands in substance for anything, it is that there is no duty of careful artisanship unless danger is probable from a careless exercise of the defendant's trade.⁵⁹

The English cases from that in *Year Book* and *Everhard v. Hopkins* down to *Parry v. Smith* recognize and enforce the rule stated in general terms by Fitzherbert, that "Every artificer must exercise his trade rightly as he ought." Nor are they instances of exceptional or anomalous liability arbitrarily held to be incident to certain specific trades and professions. Some of them deal with trades which are in their nature quasi public trades, the exercise of which is essential to the public—public utilities in the broad sense

⁵⁹ In *Parry v. Smith* the case is distinguished upon this last ground, that the defendant was not dealing with a thing in its nature dangerous (if the work were not properly done), and that in *Parry v. Smith* he was so dealing. In *Heaven v. Pender*, Brett, M. R., treats it as a case in which the declaration was bad because there was no allegation that the plaintiff had come upon the premises as a guest. Take it at its best, the declaration is vague, and the case can be scarcely said to stand for anything other than a declaration so vaguely worded fails to disclose any cause of action.

of the term, trades which must be exercised if the public offer themselves as patrons; not merely properly exercised, if at all. But while carriers of goods and passengers may fall within this class, the cases, as has been seen, include many trades which have no such public character.

All, however, possess certain common characteristics, they are trades or professions from which, unless carefully practised, injury may be expected to result to those upon whom they are practised, or to the public generally, or some class thereof. He who engages in such a trade for gain assumes as an incident to its practice the duty to practise it competently. In *George v. Skivington* ^{59a} the defendant, an apothecary, had sold a hairwash, which he had himself manufactured, to the husband of the plaintiff, who was injured by the use of it, it being unfit for use as a hairwash.

Now, the making and sale of drugs, though in this case done by an apothecary, was originally an integral part of the functions exercised by physicians. Until quite recently nearly every medical practitioner made and sold the drugs he prescribed. There could be no doubt that had the defendant been a physician who had prescribed and made the hairwash, the case would have fallen under the direct authority of *Pippin v. Sheppard* and *Gladwell v. Steggall*, nor could he have escaped liability because the particular phial of medicine had been sold and delivered by him and paid for in addition to his fee for treatment. When the functions of physicians were divided and a part thereof fell to the apothecaries, this part, of course, carried with it the incidental duties which previously attached to it,⁶⁰ and so though today the trades and professions of apothecary and physician and surgeon have become distinct and separate, there is no reason why each should not retain the obligations originally imposed on the parent professions of which each is but a part. However, the court did not base their decision upon the obligation of apothecaries as a separate trade, or as exercising a part of the original profession of physicians,

^{59a} L. R. 5 Ex. 1.

⁶⁰ In fact, the very instance of liability to one not party to the contract given by Parke, B., in *Longmeid v. Holliday*, is that of an apothecary who administered improper medicines to his patients.

but upon the broad ground that those who make an article to be sold for an immediate particular use, on the faith of its appearance of fitness therefor, must take due care in its manufacture. Cleasby, B., said: "It is alleged that the defendant himself manufactured this wash with ingredients known only to him, and that he held it out to be of a certain quality and that it was not of that quality, that he knew it was purchased for the purpose of being used by the female plaintiff. Under the circumstances, I think there was a duty imposed on him to use due and ordinary care in its manufacture, and a breach of that duty. The two things concur, negligence and injury flowing therefrom." Kelley, C. B., said: "It is not necessary to enter into the question of warranty, because the contract of sale is only alleged by way of inducement, the cause of action being for an injury caused to the wife of the purchaser by reason of an article sold for her use turning out to be unfit for the purpose for which it was sold. I think that, quite apart from any question of warranty, there was a duty on the defendant to use ordinary care in compounding this wash. Unquestionably, there was a duty towards the purchaser, and it extends to the person for whose use the vendor knew the compound was purchased. *Longmeid v. Holliday* is distinguishable because there was there found *bona fides* and no negligence on the part of the vendor."

Thus it has been seen that Fitzherbert's rule is applied—1st, where the injury is done by some careless act or omission in the direct practice of the defendant's calling upon the very person injured, as in *Pippin v. Shepard*, *Dalyell v. Tyrer*, and *Marshall v. R. R.*

2d. Where the injury is the indirect, though natural, consequence of the improper performance of work on the property of the person injured, Y. B. 3 Hen. VI, 36, pl. 33, and 20 Hen. VI, 34, pl. 4; or of another, *Everhard v. Hopkins*, *Parry v. Smith*.

3d. Even where in the course of his trade or profession the defendant makes and puts on the market an article which is so incompetently made as to unfit it for the use for which on its face it is designed. *George v. Skivington*.

Against these decisions stand only dicta, of eminent judges, it is true, but still mere dicta.

In *Francis v. Cockrell*,⁶¹ Martin, B., says: "I consider (the contractor who erected the stand) stood in too remote a position from the plaintiff to be liable to an action by him. The law of England looks at proximate liabilities as far as is possible and endeavors to confine liabilities to the parties immediately concerned. It is apprehended that it would be impossible to contend that a person who had erected a building strictly according to his contract would be responsible to a stranger who happened to go on it if it be found to be unfit for its purpose."

It may, however, be said that the proximity which determines the existence of an obligation to act or refrain from action depends upon the reasonable probability of injury to the obligee if such duty is disregarded. That which determines the liability for the consequences of the default once established depends upon the unbroken sequence of events, whereby unassisted, save by natural causes or the usual customary action of men or animals under the conditions created, the wrong works out its injurious tendencies to their natural end. Proximity in the sense that the parties are dealing directly with one another, that they are brought consciously face to face, has never been regarded as necessary. That the stewards of the race-track put the stand to the very use for which it was designed does not break the chain of proximate cause between the contractors' default, if any existed, and the spectator's injury, nor could it be contended that the stewards' act was anything but the usual action of one for whom such a stand was built. Surely, the contractor is as proximate to the spectator as the apothecary in *George v. Skivington* to the wife of the customer, the spectator as immediately concerned with the contractor's conduct, as the housekeeper in *Parry v. Smith* was with the

⁶¹ L. R. 5 Q. B. 501, page 510. The stewards of a race meeting were held liable for the fall of a stand negligently constructed by the contractors. There was no personal negligence or knowledge of the defect on the defendant's part, and the plaintiff was a spectator who had paid for admission.

way in which the gasfitter did his work. In neither case did the parties deal with one another directly. Just as, in *Parry v. Smith*, the defendant must, had he thought, have realized that persons might come into the cellar, and so would be dependent for their safety on his care, and as, in *George v. Skivington*, the defendant knew that the customer was going to give the hairwash to his wife to use, and so she only was concerned with its preparation, so here the contractor must have known that the stand was not erected for the private use of the stewards, but would be thrown open to the public, whose safety would depend on the manner in which they built it. Had the defect been open and patent, or had the plans as presented by the stewards been faithfully carried out,⁶² there would have been reason to say that the injury was the result of the stewards' misuse of a defective stand, or their error in not designing one fit for the number of persons they wished to accommodate. Then the act of the stewards would have intervened between the defendant's act and the injury, and itself been the sole proximate cause thereof.

The statements of Rolfe, B., and Lord Abinger, C. B., in *Winterbottom v. Wright* have already been examined.

There remains the following dictum of Willes, J.,⁶³ to whose opinion, however expressed, the highest deference is due. "There would be no end of actions if we should hold that a person having once done a piece of work carelessly could independently of honesty of purpose be fixed with liability by reason of bad material or insufficient fastening. Take the case of a man building a house; his work-people scamp the work, and five or six years after, through a high

⁶² It would appear that Baron Martin considered the case as one where the stand fell, not because of the contractor's carelessness, but because badly planned, probably by some architect independently employed by the stewards. If so, no doubt the contractors were not responsible, having been guilty of no wrong of commission or omission. They are not bound to judge of the propriety of the thing they make for the purposes for which it is to be used, they are entitled to believe it will be put only to such use as it may be fitted for. The facts as stated in L. R. Q. B., page 187—i.e., that the stand was negligently and improperly erected and was insufficient for the purpose for which it was erected,—perhaps admit of this view.

⁶³ *Collis v. Selden*, Q. B. 3 C. P. 497, see *supra*, page 298.

wind, the chimney-stack falls and injures a person with whom he has no contract, to whom he owes no duty, and against whom he cannot have been guilty of any fraud. To hold him liable to an action at the suit of the injured person would be going far beyond anything which has been decided in our law." The case of *Parry v. Smith* is direct authority that one who has done work carelessly is liable to anyone injured to whom danger is threatened, and that honesty of purpose is no defence. Given an injury caused by a breach of duty towards the person injured, it is surely not the policy of the law to discourage action to give compensation, nor would a builder who had built with bad materials or himself fastened his work insecurely be protected. So early as the time of Henry VI it was recognized as a builder's duty to build carefully quite apart from his contract, nor would mere lapse of time terminate his liability; it might, and very probably would, make it difficult to trace the injury to the original wrongdoing of the builder, difficult to tell whether the chimney fell from some original defect or from subsequent lack of repair, especially where, as in the example given, it required a high wind to bring it down; and it is probably this difficulty of proof which has led to the entire absence of authority on the subject. If the injury were once traced to the defendant's misconduct, the mere fact that his wrong had for years produced no ill results would not make the plaintiff's injury any less the proximate legal consequence of it.⁶⁴ Nor does it appear, save by inference, that the builder spoken of was not, both at the time of the building and of the fall, the owner of the structure, and that the person injured was not a traveller on an adjacent highway. If such were the case, there seems little doubt that a recovery might be had, no matter how much time had elapsed between the wrong and the injury. However, since in such case the

⁶⁴ Compare Agnew, C. J., in *Elkins v. McKean*, 79 Pa., page 502. "The wrongdoer cannot claim exemption for liability for his terrible wrong because he has sent it through many hands. The length of its passage may create a doubt of its identity, or that it was sent on its mission of destruction with a full purpose and knowledge of its dangerous qualities, but the facts being established, he cannot escape the consequences of his crime against society."

builder, as occupier, "would owe a duty" to the traveller, it is fair to infer that the builder intended is one who has built the house for another on that other's land, and has turned it over to him. Still, even then, it by no means follows that the plaintiff is not a traveller on a highway; if so, a building so constructed would be a public nuisance thereto, and the builder would be liable for its creation,⁶⁵ for surely one who creates a nuisance is not exempt from liability for an injury caused by it because for a long time it has harmed no one.

What Willes, J., seems to have in mind is the hardship that a person honestly doing all he can should be liable for the acts and omissions of his servants which he is powerless to prevent. However, the same hardship exists in all cases where a master is badly served by his servants. He himself may be harmed, but he must also answer for injuries caused to others, since the servant is acting for his benefit and about his business. As between him and the person injured, both innocent of personal misconduct, it is surely just that he who has received the benefit should bear the burden, and that the builder who had built the house for reward, and in the exercise of his trade, should be responsible for the imperfections of the instruments he uses to carry on his business.

Any other rule would tend to encourage careless workmanship, and while it may well be the policy of the law to encourage trade and commerce, it is quite a different thing to encourage carelessness therein. To make the public bear the risk of the manner in which trades and professions are carried on would be to throw upon them a burden without any corresponding benefit, and to remove from those who benefit by the exercise of such trades and professions every incentive to care.

To protect the builder from the consequences of using bad material is to excuse him from a conscious personal misconduct unless the material was bought of a reputable dealer and the defect therein was latent. In such case there would be no misconduct in any event, either on his part or on

⁶⁵ See Parke, B., in *Longmeid v. Holliday*, *supra*, page 284.

that of those who were his servants engaged upon his business for his benefit, and to require him to be liable for such injury would be to make him a guarantor as against all the world of the soundness of that which he had constructed. This, no doubt, would go far beyond anything decided in the English law, and would be impolitic in the extreme, imposing, as it would, a duty of which no care could insure performance. It is submitted, however, that the cases, while falling far short of imposing so unreasonable a burden, do cast on everyone exercising a trade a duty to exercise it carefully, both personally and through the servants whom he employs therein. However, as Willes, J., says later in his opinion that "the declaration should have shown that the chandelier was dangerous in itself, or so hung as to be dangerous," it may well be that he would agree, that where from the nature of the work injury is probable, unless care be taken, an obligation does arise to do that work carefully.

Where, however, the vendor is in no way responsible for the creation of the defective condition of the article sold, any liability on his part must rest upon some misconduct, some act or omission, as vendor.

The vendor⁶⁶ as such, apart from the obligations created by the contract of sale,⁶⁷ may become liable through active or passive misconduct. In *Langridge v. Levy* it was held that one who sold to a father a shotgun expressly for his son's use, and represented it to be a Nock gun, a gun of well-established reputation, when he knew it to be a cheap, inferior, and unsafe gun, was liable to the son for injuries sustained by its explosion while in his use.

In *Clarke v. Army and Navy Stores*,⁶⁸ the Court of Appeals, Henn Collins, M. R., Romer and Mathew, LL. J.,

⁶⁶ This is a liability common to all who supply others with either chattels or real property for immediate use, whether by sale, lease, loan, or gift. The wrong consists of misconduct, the wilful, conscious leading of another into a danger known only to the wrongdoer. See Bramwell, B., in *Southcote v. Stanley*, *supra*, page 226.

⁶⁷ Henn Collins, M. R., in *Clarke v. Army and Navy Stores* (1903), L. R. 1 K. B. 155-164: "Independently of any warranty, a relation arises out of the contract of sale between the vendor and purchaser which imposes on the former a duty towards the latter."

⁶⁸ (1903) L. R. 1 K. B. 155.

held that "Independently of any warranty a relation arises⁶⁹ out of the contract of sale between the vendor and purchaser, which imposes on the former a duty towards the latter—namely, the duty if there is some dangerous quality in the goods sold of which he knows, but of which the purchaser cannot be expected to be aware, to take reasonable precautions in the way of warning to the purchaser that special care will be requisite."⁷⁰ A tin of baking powder known to be of such quality or so put up as to be explosive was sold by the Army and Navy Stores, which merely sold at retail. A rule known to the purchaser provided that no warranties were to be given with the goods sold, except by written authority of the management. Thus all express warranties were excluded; the court, while refusing to decide that such a rule would destroy all those implied warranties which arise out of the act of sale,⁷¹ preferred to base their decision on the duty arising out of the relation of vendor and purchaser.

Thus the vendor is bound not to misrepresent the quality and condition of his goods either by express words or active concealment. To do so would be actual, active fraud, for which an action of case for deceit would lie. He is also bound to disclose any quality or condition known by him to render the goods dangerous for use if the purchaser cannot be expected to discover it. This is a positive duty, for breach of which an action on the case will lie. The conduct while wrongful is not fraudulent; it is necessary not only that the defect should be known, it must also be one which renders the article probably unsafe for use.⁷² The obligation, since

⁶⁹ And is created by it.

⁷⁰ Henn Collins, M. R., page 164.

⁷¹ Intimating that the rule only applied to collateral warranties in addition to those arising out of the sale and the nature of the article sold.

⁷² In *Langridge v. Levy* there was some evidence that the defendant knew not only that the gun was not made by Nock, but also that it was unsafe for use, and the jury so found; and Baron Parker throughout his opinion emphasizes the defendant's knowledge of the unfitness of the gun for use. However, it is submitted that in the action of deceit, if the defendant leads another to act on a known false statement, it is immaterial that he intended harm to result or even that he should have realized that harm was a probable result of action on the faith of the falsehood. That harm actually resulted from action on the faith of the false statement is enough.

it arises not out of the contract, but from the relation of vendor, extends to all who may be expected to use it on the faith of its deceptive appearance.

But the vendor is not bound to inspect the articles which he sells in order to discover any possible defects which may unfit them for use. In *Longmeid v. Holliday*⁷³ it was contended that ignorance of a defect in the article sold which could have been discovered by inspection was equivalent to knowledge thereof. The declaration was clearly framed on *Langridge v. Levy*, and the right of action alleged was expressly based on the defendant's deceit. The defendant was the vendor of lamps patented by him. The lamp in question was sold to the husband of the plaintiff, and was alleged to have been made of weak and insufficient materials, and to have been cracked and leaky, and that in consequence it exploded and injured the plaintiff. It was shown in evidence that the defendant had not constructed the lamp himself, but had purchased the parts from third parties and had them put together by others, and that he did not know of the defective condition of the lamp sold, and had sold it in good faith. The allegation of actual fraud not being sustained, the action framed in deceit could not lie unless there existed a duty to know, the breach of which would be legally equivalent to knowledge.⁷⁴ It was held that there being no actual fraud shown and "no misfeasance towards the plaintiff independently of the contract," she could not recover. Parke, B., said: "There are other cases beside those of fraud in which a third person, though not a party to the contract, may sue for the damage sustained if it be broken. These cases occur where there has been a wrong done to that person for which he would have had a right of action, though no such contract had been made," but he

⁷³ 6 Exch. 761.

⁷⁴ As where goods are warranted, an action of deceit lay without proof of the scienter, the warranty making it the duty of the defendant to have the goods answer to it, and until the beginning of the nineteenth century the usual mode of recovering for breach of warranty was in an action of deceit. The declaration in *Longmeid v. Holliday* was very closely analogous to such actions, and was in substance an attempt to hold the defendant as a warrantor to all who might use the article that it had been carefully inspected.

holds that there is no actionable wrong in the absence of any obligation contractually assumed in the mere transfer of "an article not in its nature dangerous, but which might become so by a latent defect entirely unknown, though discoverable by the exercise of ordinary care even by the person who manufactured it."

It is to be noticed that there was no allegation that the defect was caused by carelessness of the defendant in its manufacture. The evidence showed that he had purchased the parts from third parties who were not alleged to be incompetent, nor did he himself or by his servants put the parts together; this, too, was done by others not alleged to be incompetent. The defendant, therefore, did not himself or by his servants create the defective condition, he was not the maker, but the vendor merely; the case, therefore, is authority only as to the obligation of a vendor to his vendee arising out of the act of transferring the title and possession of property. To such a relation no higher duty attaches than to the gratuitous transfer of an article, as by gift or loan. The position of the defendant in each is that of one transferring property to another for use for purposes in which the transferrer has no further concern. This case decides, at most, this: that in the absence of fraud or conscious concealment of a known though latent defect, the vendor's only liability is upon warranty express or implied, which being purely consensual, can extend no further than the vendee. It settles that there is no duty by a vendor, as such, to inspect a chattel before he sells it, or even, if he has had it made for him to sell, to inspect the materials purchased from reputable dealers, or to personally superintend the work of construction. If the defect is patent to inspection, the vendee is bound to notice it, and his is the primary duty to see that an article he uses is fit for the use to which he puts it. If the defect be latent even to inspection, no recovery could be had unless upon the warranty. The vendor's liability on his warranty does not arise by reason of a failure to inspect, it is to answer if the article be not as warranted, and he is liable though no inspection could

have discovered the defect or even if he has subjected the article to a rigorous examination.

It is intimated, in addition, that even though the vendor himself manufactures the article, he is not bound to inspect it before selling it. The case does not, however, in any way decide that he is not bound to exercise care in its manufacture, or that a transfer of the property terminates his liability for his misconduct or breach of duty, which has resulted in the creation of a dangerously defective article. As the declaration alleged no misconduct or carelessness on the defendant's part in manufacture, and no bad faith in the sale, the case, as Kelley, C. B., says of it in *George v. Skivington*,⁷⁵ decided only that "there being *bona fides*⁷⁶ and no negligence,⁷⁷ no recovery could be had save on the warranty."

In his opinion Parke, B., intimates that the duties of a vendor are identical with those of a lender or donor of an article. There is no doubt that the obligations arising out of the act of transfer whether by lease, sale, loan, or gift, whether of a chattel or real property, are the same. *McCarthy v. Young*⁷⁸ holds that one who lends to another a ladder for a use in which that other was alone concerned was not liable, save for fraud or non-disclosure of defects known to him but latent to the borrower. This is identical with the decision in *Gautret v. Egerton*,⁷⁹ that an occupier of real property owed no duty other than these to a bare licensee. But in that very case Willes, J., says: "Some wrongful act or some breach of a positive duty must be shown" to constitute actionable negligence. The only act wrongful in a transferrer of property is fraud or non-disclosure of known dangerous defects, which makes the act of transfer itself a conscious leading of the transferee into a known danger. No positive duty to see that the thing is fit for use can arise

⁷⁵ L. R. 5 Exch. 1, *infra*, page 299.

⁷⁶ As vendor.

⁷⁷ None as vendor, for there is no duty to inspect an article before sale, none as manufacturer, for he did not manufacture the lamp.

⁷⁸ 6 H. and N. 329.

⁷⁹ *Supra*, page 224.

because the transferrer has no further interest in the use of the thing transferred; but where the article is not merely loaned, but is actually made by the lender for the express purpose of being so loaned and used, if he actually make by his misconduct ⁸⁰ a thing dangerous if used by the borrower, and if the danger is latent when the article is loaned, there would be active misfeasance antecedent to the loan, and the case would fall under *Corby v. Hill* ⁸¹ rather than *Gautret v. Egerton*.⁸²

Francis H. Bohlen.

⁸⁰ While in *Longmeid v. Holliday*, Parke, B., intimates that the vendor is not liable for failing to use care to discover a latent defect, even if himself the manufacturer, still this does not really touch the present point, which concerns the liability, not for a failure to discover a defect, but for wrongfully creating it.

⁸¹ *Supra*, page 224.

⁸² *Supra*, page 224.